No. 83-5818

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THOMAS EUGENE CREECH,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

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STATEMENT OF THE CASE

Respondent is unable to accept the characterization of this case furnished by petitioner. The underlying premise of the petition for certiorari is that petitioner was denied the right to present evidence at a "sentencing" proceeding ordered by the Idaho Supreme Court. (Petition, p.3). Contrary to the impression fostered by petitioner, the proceeding at which he was denied the opportunity to present evidence was not a sentencing or "resentencing" hearing. Instead, it was a proceeding ordered by the Idaho Supreme Court for the sole purpose of correcting what the court perceived to be a formal defect, based on a state statute, in the manner in which sentence was pronounced on petitioner.

The record in this case would reveal that following petitioner's conviction on a guilty plea to first degree

murder, a hearing was conducted on January 11, 1982, for the purpose of receiving evidence and argument in aggravation and mitigation. The petitioner was present with his lawyer. Several witnesses testified for the State and for the petitioner, including petitioner himself. Exhibits were received, the presentence report was discussed, and at the conclusion of the proceedings Creech was given additional opportunities to make comments or to present further information. He was also advised of his right to appeal. The trial judge, after hearing the evidence in aggravation and mitigation, took the sentencing question under advisement, citing a need to study the materials submitted in aggravation and mitigation. Two weeks later, on January 25, 1982, the judge issued his sentencing decision in writing. Petitioner was sentenced to death. No proceeding was conducted in the courtroom for the purpose of orally announcing the sentence imposed upon the petitioner, and that circumstance was one of the bases of petitioner's claims of error in the Idaho Supreme Court. That court, concluding that Idaho Code § 19-2503 and Idaho Criminal Rule 43(a) required that sentence be pronounced orally in open court, returned the case to the district court for the purpose of imposing sentence in accordance with the statutory requirement and the requirement of the criminal rule. The Idaho Supreme Court retained jurisdiction over the appeal during the time of the temporary remand to the district court. The procedure followed was summarized by the court in footnote

one of its opinion in State v. Creech, 670 P.2d 463 (Idaho 1983).

> The district judge executed a written document which imposed the death sentence upon Creech. That document was served upon Creech and his counsel. I.C. § 19-2503 and I.C.R. 43(a) requires sentence to be pronounced in open court with a defendant and his counsel being present. The district judge did not conform with those requirements. This court, therefore, by order of the 24th day of February 1983 vacated said sentence of death and remanded the cause to the district court for the imposition of such sentence as the district judge might find just and appropriate to be imposed upon Creech in open court with Creech and his counsel present. Consistent with that order or remand, the district judge convened the court on the 17th day of March, 1983 and in the presence of Creech and his counsel, imposed the death penalty upon Creech. The execution of that death penalty was stayed pending these proceedings before this court. State v. Creech, supra, 670 P.2d at 466, fn.1.

The Idaho Supreme Court did not decide any question of federal law with respect to the foregoing.

When the case was returned to the district court for the purpose of reimposing sentence, the petitioner demanded a new evidentiary hearing. His request that regard was denied. The Idaho Supreme Court has not decided any question respecting the federal constitutional sufficiency of the district court's action rejecting his demand for a second sentencing hearing.

SUMMARY OF ARGUMENT

I. The Idaho Supreme Court has not, in petitioner's case, been presented with or decided the question of whether

the petitioner was entitled to a second sentencing hearing when the Supreme Court of Idaho remanded petitioner's case to the district court for correction of a formal sentencing defect. Accordingly, no federal question is properly before this court.

2. The petitioner was not entitled to a second sentencing hearing as a matter of federal law. The action of the trial court in imposing sentence in writing, rather than having the petitioner before it, did not implicate any question of federal constitutional law. Although the procedure may have violated the statutes of the State of Idaho, petitioner was given a full aggravation and mitigation hearing, at which he was present and assisted by counsel. He had the opportunity to present all mitigating evidence he desired and the circumstance that the district court chose not to announce its judgment orally raises no federal constitutional question.

3. The petition constitutes an abuse of legal process. Its only apparent purpose is to forestall final resolution of petitioner's case.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

The Idaho Supreme Court Did Not Decide The Federal Question Raised By Petitioner.

The question presented here by petitioner, whether he was entitled to a second sentencing hearing as a matter of federal constitutional law, arising out of the circumstance that the court made a formal mistake in pronouncing sentence, was not

presented to the Supreme Court of Idaho nor decided by the court. State v. Creech, 670 P.2d 463 (Idaho 1983). This Court has held that it will not consider a federal question in cases where the highest court of a state has not decided the federal question, or the federal question was not presented in such a manner that it was necessarily decided by the action of the state court. Street v. New York, 394 U.S. 576 (1969). Moreover, where a state court has failed to pass upon a federal question, it will be assumed the omission was due to the want of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary. Id. See also, Bailey v. Anderson, 326 U.S. 203 (1945); Chicago, I. & L.R. Co. v. McGuire, 196 U.S. 128 (1905).

A litigant's failure to present a federal question in conformance with state procedure, for which failure a state court declines to consider the federal question, constitutes an adequate state ground barring review in the United States Supreme Court. Michigan v. Tyler, 436 U.S. 499 (1978).

II.

There Was No Federal Constitutional Violation In The Trial Court's Action Imposing Judgment In Writing Or In The Manner By Which The Defect Was Remedied. Inasmuch As The Petitioner Had No Federal Constitutional Right To Have Sentence Imposed Orally, Rather Than In Writing, Such Actions As The State Courts Took In Responding To Petitioner's Complaint About The Procedure Were Matters Of State Law.

Appellant was given every conceivable opportunity to present evidence, to argue, and to speak personally at his

sentencing hearing. The long-standing test for determining whether the defendant's absence at a particular point in the proceedings amounted to constitutional error was set forth in Snyder v. Massachusetts, 291 U.S. 97 (1934), and was reasserted in Faretta v. California, 422 U.S. 806 (1975). The principle has been followed by the Idaho Supreme Court. State v. Carver, 94 Idaho 477, 490 P.2d 676 (1972).

> [T]he defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . .
>
> In all the cases thus assumed the presence of the defendant satisfies the test that was put forward a moment ago as basic and decisive. It bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. . . . So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. Snyder v. Massachusetts, 291 U.S. at 106-107. (emphasis added)

Upon the premises stated, the court found no error in the trial court's refusal to permit the defendant to be present at a jury view of the location where a robbery and murder had been committed. The court's rationale was that at a jury view, with nothing more, there was nothing the defendant could have done,

had he been present, and almost nothing he could have gained by his presence. 291 U.S. at 108.

The central purpose of the due process clause, as it applies to criminal cases, is to secure to the defendant the right to be fairly treated in the proceedings taken against him. Faretta v. California, supra; Snyder v. Massachusetts, supra; State v. Carver, supra. "Fundamental fairness," as far as the concept is relevant to the petitioner's case, required only that the petitioner be afforded every reasonably opportunity to present evidence in argument and mitigation, to make a personal statement, and to make appropriate legal objections. Faretta v. California, supra; Snyder v. Massachusetts, supra; State v. Carver, supra. Proceedings held in the absence of the defendant do not implicate the due process clause unless there is a genuine risk that the defendant's absence might frustrate the fairness of the proceedings. Faretta v. California, supra; Snyder v. Massachusetts, supra; State v. Carver, supra; State v. Higley, 621 P.2d 1043 (Mont. 1980); State v. Walker, Wash.App., 536 P.2d 657 (1975); People v. Coyle, 200 P.2d 546 (Cal. 1948), cert. denied, 337 U.S. 909, reh. denied, 337 U.S. 934.

Petitioner was not denied any opportunity to be heard on any matter of mitigation or defense. The only "proceeding" he missed was the judge's personal deliberations about the sentence. Petitioner could not have participated further than he did, even if the court had brought the appellant into the courtroom and read the opinion in open court. Thus, the

privilege of presence sought by appellant 'would be useless, or the benefit but a shadow,' Snyder v. Massachusetts, supra, and the petitioner's absence in such circumstances had no constitutional significance.

The Idaho Supreme Court's election to remand the case for oral pronouncement of sentence was based entirely on matters of state statutory law and the rules of the court. It is clear that the Idaho court was not required to do so as a matter of federal constitutional law and there is simply no authority that in these circumstances the petitioner had a federal constitutional right to a new evidentiary hearing as an incident to such a procedure.

III.

The Petition Is An Abuse Of Legal Process

Respondent feels obliged to suggest to this Court that the petition for a writ of certiorari is an abuse of the process of the law. In his appeal to the Idaho Supreme Court the petitioner raised a number of federal constitutional claims, none of which he has included in the present petition for certiorari. We assume that those claims will probably be raised at a later time in piecemeal fashion. Petitioner has, to some extent, confirmed that suspicion by filing a second appeal in the Idaho Supreme Court, which is pending there now, raising only the question of whether the state district court should have granted his motion to withdraw his guilty plea. That motion was made at a time when petitioner's first appeal

was still pending before the Idaho Supreme Court and the district court had no jurisdiction to act on the motion. Rather than renewing it after the case was remitted to the district court, petitioner insisted on filing a separate appeal, which is now pending in the state supreme court.

A strategy of interminable delay and obstruction has evidently been commonly pursued by members of the bar engaged in the defense of capital cases. Justice Powell has spoken of "the now familiar abuse of process" by which last minute stays in capital cases have been sought for the purpose of obstructing the final resolution of capital cases. We believe that Justice Powell's remarks are particularly pertinent to this case:

> I do not wish to be misunderstood. No lawyer or judge would suggest a "rush to judgment" in capital cases. As our opinions have made clear, no higher duty exists in the judging process than to exercise meticulous care where the sentence may be, or is, death. It is one thing, however, to exercise this sort of care, and quite another to permit the process of repetitive review to draw out for years the resolution of issues that have, or should have been, resolved earlier.
>
> This malfunctioning of our system of justice is unfair to the hundreds of persons confined anxiously on death row. It also disserves the public interest in the implementation of lawful sentences. Moreover, it undermines public confidence in our system of justice and the will and ability of the courts to administer it. . . . Powell, speech to Eleventh Circuit Judicial Conference, Savannah, Georgia, 1983. (emphasis added).

See also, Evans v. Bennett, 440 U.S. 1301, 59 L. Ed. 2d 756 (1979).

We do not believe this Court should tolerate the efforts of petitioner and others to break down the appellate process by raising their claims fraction by fraction, year after year.

CONCLUSION

This Court should not grant the petition for certiorari. The federal question which petitioner proposes to put before the Court by this proceeding was not decided in the state courts. Moreover, the present petition raises no significant federal constitutional question and so plainly fails to do so that it must be considered an abuse of legal process.

DATED this 9th day of January, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of January, 1984, served a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT, by placing same in the United States mail, first-class postage prepaid, and addressed to Mr. Rolf M. Kehne, Office of Ada County Public Defender, 303 West Bannock, Boise, ID 83702, counsel of record for petitioner.

Lynn E. Thomas

LYNN E. THOMAS
Solicitor General
State of Idaho

CERTIFICATE OF SERVICE

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CERTIFICATE OF MAILING

I, LYNN E. THOMAS, counsel of record for respondent, The State of Idaho, do state under oath, pursuant to Rule 28.2, that the original of the accompanying respondent's RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT was placed in the United States mail on January 9, 1984, first-class postage affixed, at Boise, Idaho, and addressed to:

Alexander Stevas
Clerk of the Court
U.S. Supreme Court
Washington, D.C. 20543

LYNN E. THOMAS

SUBSCRIBED AND SWORN to before me this 9th day of January, 1984.

NOTARY PUBLIC for Idaho
Residing at Boise

CERTIFICATE OF MAILING